Supreme Court, U.S.
FILED
JAN 6 199
OFFICE OF THE C

(10)

No. 90-8370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
JEANNE ANDRACHEK
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

26 pd

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment forbid a state from employing the common law presumption of sanity in a proceeding to determine competency to stand trial?

TABLE OF CONTENTS

Question presented i

Table of authorities iii

Interest of amicus curiae 1

Summary of facts and case 2

Summary of argument 3

Argument 3

I

The common law did not place a burden of proof on the prosecution as to competency 3

II

Absent a specific federal right, a traditional right, or an essential rule, the Due Process Clause leaves evidence questions to the states 7

III

California's procedure is fundamentally fair 11

A. General principles of evidence 11

B. Fairness of the rule 14

C. Congressional determination 16

IV

Constitutionlizing rules is undesirable and should be avoided 18

Conclusion 19

TABLE OF AUTHORITIES

Cites

Ake v. Oklahoma, 470 U. S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985) 9, 10, 11

Arizona v. Roberson, 486 U. S. 675, 100 L. Ed. 2d 704, 108 S. Ct. 2093 (1988) 8, 18

Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) 14

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) 9

Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) 18

Dowling v. United States, 493 U. S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) 8

Drope v. Missouri, 420 U. S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975) 13, 15

Dusky v. United States, 362 U. S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960) 13, 15

Estelle v. McGuire, 60 U. S. L. W. 4015 (Dec. 4, 1991) . . . 8

Freeman v. People, 4 Denio 9, 47 Am. Dec. 216 (N.Y. Sup. Ct. 1847) 6

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) 11

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 5, 8, 12

Jackson v. Denno, 378 U. S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964) 7

Lisenba v. California, 314 U. S. 219, 86 L.Ed. 166, 62 S. Ct. 280 (1941) 1

Lowenfield v. Phelps, 817 F. 2d 285 (CA5 1987), aff'd 484 U. S. 231 (1988) 16, 17

Mathews v. Eldridge, 424 U. S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) 9

Medina v. California, 116 L. Ed. 2d 276 (1991) 2

Michael H. v. Gerald D., 491 U. S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) 10

Mooney v. Holohan, 294 U. S. 103, 79 L.Ed. 791, 55 S. Ct. 340 (1935) 9

Morissette v. United States, 342 U. S. 246, 96 L.Ed. 288, 72 S. Ct. 240 (1952) 8

Mullaney v. Wilbur, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) 12

Mu'Min v. Virginia, 114 L. Ed. 2d 493, 111 S. Ct. 1899 (1991) 17

Pate v. Robinson, 383 U. S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836 (1966) 14, 15

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) 12

People v. Medina, 51 Cal. 3d 870, 799 P. 2d 1282 (1990) . . 2

Regina v. Davies, 3 Cor. & K. 328, 175 Eng. Rep. 575 (1853) 6

Regina v. Turton, 6 Cox C. C. 385 (1854) 4, 6

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982) 18

Sandstrom v. Montana, 442 U. S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) 8, 12

Sawyer v. Smith, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990) 18

Snyder v. Massachusetts, 291 U. S. 97, 78 L.Ed. 674, 54 S. Ct. 330 (1934) 7

Spencer v. Texas, 385 U. S. 554, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967) 7

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 18

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 11

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) 18

The King v. Steel, 1 Leach 451, 168 Eng. Rep. 328 (1787) . 4

United States v. DiGilio, 538 F. 2d 972 (CA3 1976) . . 14, 16

United States v. Makris, 535 F. 2d 899 (CA5 1976) 16

United States v. Raddatz, 447 U. S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980) 10

Wright v. West, pending case No. 91-542 18

United States Constitution

U. S. Const. amend. XIV, § 5 16

United States Statutes

28 U. S. C. former § 4244 (1982 ed.) 16

18 U. S. C. § 4241(d) 17

California Constituion and Statutes

Cal. Const. art. I, § 14 12

Cal. Penal Code § 1369(f) 6

Cal. Penal Code § 1367 15

Treatises

J. Bishop, *Criminal Procedure* (3d ed. 1880) 6

W. Blackstone, *Commentaries* (1st ed. 1769) 4

J. Chitty, *A Practical Treatise on the Criminal Law* (5th Am. ed. 1847) 4

M. Hale, *The History of the Pleas of the Crown* (Stokes & Ingersoll ed. 1847) 4

W. LaFave, *Search and Seizure* (2d ed. 1987) 8

R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* (1986) 10

J. Wigmore, *Evidence* (Chadbourn rev. 1981) 12

Miscellaneous

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 18

Law Revision Commission comment to Cal. Evid. Code § 500 . . . . . 5, 12

Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976) 10

Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985) 10

Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21 (1977) 13, 15, 17

S. 1437, 95th Cong., 2d Sess. § 3611(d) (1978) 16

S. Rep. No. 95-605, 95th Cong., 1st Sess. 1031 (1977) . . . 17

S. Rep. No. 225, 98th Cong., 1st Sess. 236, reprinted in 1984 U. S. Code Cong. & Admin. News 3182 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner asks this Court to strike down a state evidence rule of long standing based on an open-ended test of due process which would subject state procedures to virtually limit-

---

1. CJLF has received written consent of the parties to file this brief.

less scrutiny by federal courts. The resulting expense and delay would be contrary to the rights of victims and society which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

> "From October 13 to November 7, 1984, defendant engaged in a crime spree, stealing a gun from a pawnshop, holding up two gas stations, a drive-in dairy, and a market, killing three employees of these establishments (Horacio Ariza, Douglas Metal and Victor Rea), attempting to rob a fourth employee (Moon Yoon), and shooting at two citizens (Cynthia Police and Daniel Barrow) who attempted to follow his getaway car.
>
> "Defendant was apprehended after police traced his car to his residence. Police found a gun in defendant's home that, according to prosecution experts, was used to fire the bullets found in the three murder victims. Although other family members lived with defendant, the testimony of his two sisters indicated the gun belonged to him.
>
> "Defendant challenged some of the circumstantial evidence linking him to the crimes, but (other than asserting an insanity defense) he neither denied his guilt nor offered any alibi defense." *People* v. *Medina*, 51 Cal. 3d 870, 879, 799 P. 2d 1282 (1990).

At a hearing on Medina's competency to stand trial, expert testimony was in conflict. The jury found him competent. *Id.*, at 879-880. The California Supreme Court rejected Medina's contention that the statutory presumption of competence is unconstitutional, *id.*, at 881-886, and affirmed the judgment in its entirety, *id.*, at 913. This Court granted certiorari limited to the competency question. *Medina* v. *California*, 116 L. Ed. 2d 276 (1991).

SUMMARY OF ARGUMENT

The common law did not place an affirmative burden on the prosecution to prove competency as a condition for putting the defendant on trial. California's use of the presumption of sanity in competency proceedings appears to be consistent with the common law.

If a rule of evidence does not affect any specific guarantee of the Bill of Rights, is not contrary to any established tradition, and is not contrary to a truly fundamental principle essential to a fair trial, then the Due Process Clause does not interfere with the state's decision. Defendant's call to invoke the boundless, subjective test of *Mathews* v. *Eldridge* in this context should be flatly rejected.

California's rule is consistent with basic principles of evidence. It places the burden on the party who wishes to depart from the normal course and, where defendant is the movant, has superior access to the evidence.

Constitutionalizing rules of evidence is undesirable and should be avoided. Where the rule is not truly fundamental, raising it to constitutional stature creates unnecessary delay and expense.

ARGUMENT

I. The common law did not place a burden of proof on the prosecution as to competency.

The common law treatises are consistent in their description of the law of insanity at the time of trial. Insanity at any point would halt the proceedings. Hale's description aptly summarizes the common law:

> "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that

incapacity be removed; the reason is because he cannot advisedly plead to the indictment . . . . And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he becomes of *non sane memory*, he shall not receive judgment; or, if after judgment he becomes of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution. [Citation.]

"But because there may be great fraud in this matter, yet if the crime be notorious, as *treason* or *murder*, the judge before such respite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit." 1 M. Hale, *The History of the Pleas of the Crown*, 34-35 (Stokes & Ingersoll ed. 1847) (emphasis in original, footnote omitted); accord 4 W. Blackstone, *Commentaries* 24-25 (1st ed. 1769); 1 J. Chitty, *A Practical Treatise on the Criminal Law*, 761 (5th Am. ed. 1847).

The early authorities do not appear to provide any explicit guidance on the instructions given to the jury in this special proceeding. With no special rule applicable, it seems likely that the jury was instructed on the usual rule regarding insanity. "In presumption of law, every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal." 1 Hale, *supra*, at 33.

Defendant has cited no pre-independence authority that the presumption of sanity did not apply to competency to stand trial, and amicus has found none. *Regina* v. *Turton*, 6 Cox C. C. 385 (1854) applied the presumption of sanity, referring to that rule as "the old practice."

Defendant cites *The King* v. *Steel*, 1 Leach 451, 168 Eng. Rep. 328 (1787) for the proposition that a person who had been *proven* "mute by visitation of God" was presumed mentally defective unless the prosecution proved otherwise. Pet. Brief 37. From this, defendant draws the conclusion that

"immediately before the Constitution was adopted, the English practice placed the burden of proof of capacity to plead on the prosecution." *Ibid.*

Amicus submits that the correct interpretation of *Steel* is exactly the opposite. Presumptions were devices used by the common law for two purposes: to initially place the burden of proof on one party, without any evidence, and to shift the burden to the *other* party upon proof of certain predicate facts. See Law Revision Commission comment to Cal. Evid. Code § 500, reprinted in 9 J. Wigmore, *Evidence* § 2486, n. 3, 289-290 (Chadbourn rev. 1981).[2]

There would be no reason for a presumption of incompetency from muteness operating to *shift* the burden to the party claiming competency unless the burden was initially on the party claiming incompetency. The implication of *Steel* is that, with the very limited knowledge of disabilities available at the time, a showing of muteness was thought sufficient to establish a *prima facie* case of incompetency. It follows that the party asserting incompetency must have had the burden of establishing such a case. That is, prior to the showing of muteness the usual presumption of sanity was in effect.

On the whole it seems that the concept of "burden of proof" in the sense we think of it today was considered far less significant at common law. Even the rule of proof beyond a reasonable doubt on the issue of guilt did not crystallize until the 1790's. *In re Winship*, 397 U. S. 358, 361 (1970).

The proceedings on competency seem to have been even less formal. A nineteenth century commentator paints a picture of a very loose, flexible proceeding:

"The object of this inquiry being, in the main, to in-

---

2. Modern authorities disapprove of the former use, preferring to state the burden of proof explicitly. See *ibid.*

> form the judge, it seems that he need not limit the evidence by strict rules. The prisoner, for example, may be permitted to make statements and observations to the court and the jury, and what the latter see and hear of him they may take into the account. He cannot challenge jurors peremptorily, but he may for cause. The hearing, it would appear, may, if the judge deems best, be in private." 2 J. Bishop, *Criminal Procedure* § 668, 302 (3d ed. 1880) (footnotes omitted).

Defendant cites *Regina* v. *Davies*, 3 Cor. & K. 328, 329, 175 Eng. Rep. 575 (1853) for the proposition that "lies on the prosecution" to prove competency. Yet the statement defendant quotes is counsel's argument, not the holding of the court. *Ibid.* The court's holding simply deals with the order of proof, not the burden. "I do not consider this so much an issue joined as a preliminary inquiry for the information of the Court." *Ibid.* The holding is in accord with Bishop's description of an informal inquiry. *Regina* v. *Turton*, *supra*, 6 Cox C. C., at 385, rejected defense counsel's citation of *Davies* for fixing the burden of proof. *Freeman* v. *People*, 4 Denio 9, 47 Am. Dec. 216, 218-228 (N.Y. Sup. Ct. 1847) discusses the early authorities at length without reaching any definite conclusion on the burden of proof.

In summary, then, it appears that the early authorities provide little or no explicit guidance on a formal assignment of the burden of proof as such. There appears to be little doubt, though, that the general presumption of sanity applied. Certainly the defendant had no right to an instruction placing the burden on the prosecution. California's codification of the common law presumption of sanity, Cal. Penal Code § 1369(f), is consistent with the common law and does not violate any established American legal tradition.

II. Absent a specific federal right, a traditional right, or an essential rule, the Due Process Clause leaves evidence questions to the states.

The procedure adopted by a state "does not run foul of the Fourteenth Amendment because another method may seem to [this Court's] thinking to be fairer or wiser *or to give a surer promise of protection* to the prisoner at the bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (emphasis added). At bottom, petitioner's argument is a call for this Court to reject Justice Cardozo's wisdom and do precisely what *Snyder* declined to do.

The incorporation doctrine has narrowed the scope of the *Snyder* principle, to be sure. *Snyder*'s statements about jury trial and self-incrimination, *ibid.*, are no longer true. Thus in *Jackson* v. *Denno*, 378 U. S. 368, 395-396 (1964), the Court struck down a New York procedure for determining the voluntariness of confessions because that procedure failed to adequately protect a specific federal constitutional right.

Justice Harlan carefully explained the distinction in his opinion for the Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967). "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565. *Spencer* declined to require a bifurcated trial when the defendant is charged under a habitual criminal statute, even though most people would agree that bifurcation is the better approach. See *id.*, at 567-568.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States *to promulgate their own rules of evidence* to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

This Court has, of course, mandated a large number of evidentiary rules to enforce the specific guarantees of the Bill of Rights. The Fourth Amendment rules fill a four-volume treatise. See generally W. LaFave, *Search and Seizure* (2d ed. 1987). In the self-incrimination area, this Court has stacked prophylactic rules on top of rules to draw bright lines far beyond the original reach of the privilege. See, *e.g.*, *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). Absent a specific guarantee, however, the situation is quite different.

In *Dowling* v. *United States*, 493 U. S. 342 (1990), the Court was presented with the same type of question as in the present case: whether it is acceptable to deal with the evidentiary problem at hand through a nonconstitutional source, such as the Federal Rules of Evidence or the California Penal Code, or whether the procedure in question "is so extremely unfair" that its use "violates 'fundamental conceptions of justice.' " *Id.*, at 352 (citation omitted). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has *limited application*. We, therefore, have defined the category of infractions that violate 'fundamental fairness' *very narrowly*." *Ibid.* (emphasis added); accord, *Estelle* v. *McGuire*, 60 U. S. L. W. 4015, 4018 (Dec. 4, 1991).

For the most part, the considerations set forth in *Spencer* and *Dowling* have resulted in the rejection of attempts to interfere in evidentiary matters outside the scope of the specific guarantees of the Bill of Rights. The principal exception has been the line of cases involving the presumption of innocence and proof beyond a reasonable doubt.

In re Winship, 397 U. S. 358 (1970) held that proof beyond a reasonable doubt was a requirement of due process. This requirement went back to "our early years as a Nation," *id.*, at 361, if not to the common law. Similarly, *Morissette* v. *United States*, 342 U. S. 246, 275 (1952) implied and *Sandstrom* v. *Montana*, 442 U. S. 510, 522 (1979) held that the long-standing rule of presumption of innocence was included in "due process."

Medina's proposed rule, however, falls into a third category. It is neither a specific guarantee of the Bill of Rights nor a tradition going back to the early days of American jurisprudence. Decisions incorporating such rules into the Due Process Clause are few and far between, for good reason.

In this third category, only a few rules which go directly to the heart of the accurate determination of guilt or innocence have been accepted by this Court. *Mooney* v. *Holohan*, 294 U. S. 103 (1935) held that the knowing use of perjured testimony violated due process. *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) held that the suppression of exculpatory evidence was essentially equivalent. *Ake* v. *Oklahoma*, 470 U. S. 68 (1985) required access to psychiatric assistance where the defense was insanity. The critical evidence was inaccessible to the defendant without expert assistance. *Id.*, at 80.

In each case, there was a direct, major distortion of the evidence on the central issue of guilt. The present case, in contrast, is two steps removed from the central issue. The placement of the burden on the defense *might* result in the trial of a borderline incompetent defendant,[3] who in turn *might* have otherwise produced some evidence which would have resulted in acquittal. That is far different from *Mooney*.

The cornerstone of the defendant's brief is the assertion that the three-prong balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) is *the* test of due process on "issues as to the allocation and degree of the burden of proof." See Pet. Brief 10. This test has been invoked almost exclusively in civil cases, including *Mathews* itself and the other applications defendant cites. See *ibid*. Although amicus believes that the California statute would pass the *Mathews* test, we submit that the Court should not employ that test in this case. The use of *Mathews* for general criminal due process questions would be a disaster.

---

3. See part III B, *post*, p. 15.

The *Mathews* multi-prong balancing test comes close to not being a test at all. One leading treatise has noted the "difficulty of predicting how the Supreme Court will employ the *Mathews* balancing test." 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 17.8, 267 (1986). When the outcome of a test is difficult to predict, the suspicion naturally arises that the "test" is a smokescreen for reaching a desired result. "[I]t is impossible to predict the results unless one knows the personal value systems of those doing the balancing." *Id.*, at 265. The balancing test has also been criticized as a legislative judgment to which the judiciary is ill-suited. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 30 (1976). These criticisms may not justify an overruling of *Mathews* in the areas where it has traditionally been employed, but they caution against its unnecessary extension.

Mathews arose out of the administrative state, a modern innovation with no common law heritage and no guidance in the text of the constitution. That innovation has caused its share of constitutional headaches. See, *e.g.*, Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 248 (1985). With guideposts in neither text nor tradition, perhaps an open-ended "test" such as *Mathews* is necessary. But see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127, n. 6 (1989) (lead opn. of Scalia, J.). The criminal law, however, is precisely the opposite. The trail is blazed with copious markers in the text of the Constitution and in the centuries of Anglo-American law.

The only significant application of *Mathews* to a criminal trial appears to be *Ake* v. *Oklahoma*, 470 U. S. 68, 77 (1985).[4] That case casually recited the *Mathews* test, citing only *Mathews* itself and one other civil case. *Ibid.* Yet this adoption of

---

4. In *United States* v. *Raddatz*, 447 U. S. 667 (1980), the Court "recites this test, but it does not even attempt to apply it." *Id.*, at 700 (Marshall, J., dissenting).

Mathews is fundamentally inconsistent with a host of authority in criminal cases, both earlier and later. The test calls upon the federal court to weigh the interests involved and the value of the procedure in question. *Ibid.* This is a far cry from the extremely limited scope of due process review established in *Snyder*, *Spencer*, *Dowling*, *McGuire*, and other cases. See, *e.g.*, *Lisenba* v. *California*, 314 U. S. 219, 227-229 (1941) (rejecting federal supervision of relevance and prejudice rules of evidence).

Ake could easily have reached its result without plunging the criminal law into the abyss of the nebulous *Mathews* test. *Ake* was a relatively modest extension of the preexisting rights to access to exculpatory evidence under *Brady* and to appointed, effective counsel for indigent defendants. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963); *Strickland* v. *Washington*, 466 U. S. 668, 700-701 (1984).

Amicus submits that the Court should disclaim any application of the boundless *Mathews* test to criminal procedure. That test would effectively declare open season on state procedures in federal courts. Due process analysis in criminal cases should be limited to the Bill of Rights, the common law supplemented by American tradition, and the procedures essential to a fair trial. Other questions of evidence and procedure are proper issues for decision by the people through the democratic process.

III. California's procedure is fundamentally fair.

A. General Principles of Evidence.

Looking at the present question, for the moment, strictly in terms of general principles of evidence, California's rule is precisely correct. The statute fixes the burden of producing evidence, the risk of nonpersuasion, and the measure of the jury's persuasion just where they should be.

The concept of burden of proof, in the sense of the risk of nonpersuasion, is not limited to legal proceedings. It arises any time two people attempt to persuade a third person. 9 J. Wigmore, *Evidence* § 2485, 285 (Chadbourn rev. 1981). If A wants M to invest money, and B does not want M to make the investment, then A has the burden of proof, because M will not invest if he is not convinced. "It is the *desire to have action taken* that is important." *Id.*, at 285-286 (emphasis in original).

Wigmore's example assumes that no action has yet been set in motion. Taking the example one step further, if M has already subscribed for stock in A's enterprise, B would have to convince M to back out, because people normally fulfill their agreements. A more general statement of the reality of "practical affairs generally," then, is that the risk of nonpersuasion falls on the person who wishes the result to be different from what it would be if the question had never come up.

This distinction is the reason why the rules of *In re Winship*, 397 U. S. 358 (1970) and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) only apply to elements of the offense and not to those external issues which provide a defense despite the truth of the elements. In *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), "malice" was an element of murder, and the burden of negating malice could not be shifted to the defendant. In *Patterson* v. *New York*, 432 U. S. 197, 206 (1977), on the other hand, the prosecution had proven all of the elements. Conviction would then follow if the issue of self-defense had never come up; the burden of proving self-defense could therefore be placed on the defendant.

In California, the prosecution initiates felony proceedings by convincing a grand jury or a magistrate that there is sufficient cause to believe that the defendant has committed a felony. See Cal. Const. art. I, § 14. From that point, trial will proceed if nothing comes up to block it. Placement of the burden of proof on whichever party seeks to derail the train conforms to the first principle of placement of the burden. See also Law Revision Commission comment to Cal. Evid. Code § 500, reprinted in 9 Wigmore, *supra*, § 2486, 288-289, n. 3.

Another consideration in the placement of the burden is whether one party has knowledge of the facts unavailable to the other party. On this point there is a strong case for placing the burden on the defendant.

The reason why an incompetent defendant cannot be tried is that the defendant's cooperation may be essential to the making of the defense. See *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975). The defendant may have an alibi, but be unable to tell counsel where he was. He may have killed in self-defense and be the only living witness, yet be unable to testify due to mental illness. These facts all relate to *past events*. The defendant's inability to testify about them or even give counsel investigative leads may put critical facts out of reach.

Present competency to stand trial is far different. The past is relevant only to the extent that it sheds light on the present. The key is whether the defendant "has sufficient *present* ability to consult *with his lawyer* . . . ." *Dusky* v. *United States*, 362 U. S. 402 (1960). This definition places defense counsel in a unique position. Counsel *personally* is the key percipient witness to the ultimate fact in issue. See Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 27 (1977). Indeed, because of the confidentiality of attorney-client conferences, members of the defense team may be the *only* witnesses to directly observe whether the defendant is able "to consult with his lawyer."

On the second prong of the *Dusky* test, rational and factual understanding, 362 U. S., at 403, the defense once again has superior access to evidence. The defense lawyer and his retained or appointed experts are "on the defendant's side" and trying to help him. If the defendant can understand that, he is more likely to cooperate with the defense than with the prosecution. If he cannot, that inability is evidence tending to prove incompetency.

The argument that incompetency renders the defendant unable to prove his incompetency is specious. Incompetency is not proven by the defendant personally. It is proven pri-

marily by the testimony of witnesses who observe the defendant's present behavior. While the jailers disposed to help the prosecution may observe a greater quantity of defendant's behavior, the defense team observes the behavior directly relevant to the competency issue. The other typical source of evidence is testimony about the defendant's childhood, usually by family members disposed to help the defense. See, *e.g.*, *Pate* v. *Robinson*, 383 U. S. 375, 378-379 (1966).

On the second general principle, then, the California rule is again correct, at least in the situation where the defendant is asserting incompetency. The defense team has superior access to the evidence, and it is fair to place the burden on them.

B. Fairness of the Rule.

Failure to distinguish between the defense team and the defendant personally is the root of two closely related and equally fallacious arguments. *Pate* v. *Robinson*, 383 U. S. 375, 385 (1966) held that a defendant whose competency has not yet been determined cannot waive his right to the determination. *United States* v. *DiGilio*, 538 F. 2d 972, 988 (CA3 1976) held that the same principle precludes presuming that the defendant has enough intelligence to produce evidence of his own incompetence. Medina makes a similar argument based on California's state nonwaiver rules. Pet. Cert. 12-13.

The common fallacy of these arguments is that the decision to waive basic rights is personal to defendant and must be understood by him, see, *e.g.*, *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), while a psychiatric examination does not require that the subject understand what is happening. Indeed, the farther out of touch with reality the subject is, the more certain the experts will be of his incompetency.

Where the magnitude of the burden is preponderance of the evidence, the placement of that burden only makes a difference "in the rare case when . . . the conflicting evidence is in equipoise in the mind of the fact finder." *DiGilio*, *supra*, 538 F. 2d, at 988. While an argument can be made that such a defendant should not be tried, this is precisely that kind of

value judgment that a government of, by, and for the people should make through the democratic process.

The *Dusky* definition of competency is phrased in binary terms.[5] Can the defendant assist counsel, yes or no? Does he understand, yes or no? Reality is not binary.[6] The difference is the same as the difference between a light bulb on a simple on/off switch and one on a variable dimmer. *Dusky* asks whether the light is on or off, when in fact it may be glowing dimly.

A defendant who may or may not be "competent" as defined in *Dusky* will typically be marginally competent. Dr. Pierce's testimony in the present case that Medina would cooperate "to the extent that he is able," J. A. 68, indicates the difficulty presented by the requirement of a yes or no answer. Psychiatrists testify as to the extent defendant is able to cooperate, and the trier of fact decides whether that extent falls on one side or the other of the *Dusky* line. Burden of proof will make a difference when the extent of impairment is borderline.

The effect of the allocation of the burden of proof is therefore not so much a risk of "error" as it is a determination of the *degree* of mental impairment which will halt the trial. It is a decision as to whether the dimly glowing bulb will be treated as on or off.

Past cases have held that the common law rule against trial of an incompetent is within the protections of the Fourteenth Amendment Due Process Clause. *Drope* v. *Missouri*, 420 U. S. 162 (1975); *Pate* v. *Robinson*, 383 U. S. 375 (1966). It does not follow, however, that every aspect of the state court's compe-

---

5. California's statutory definition is essentially the same. Compare *Dusky*, *supra*, 362 U. S., at 402 with Cal. Penal Code § 1367.

6. Pizzi, *supra* p. 13, 45 U. Chi. L. Rev., at 54-55, n. 170, cites a study measuring capacity "on a scale from total incapacity to no incapacity in 13 different functions."

tency determination must thereby come under the control of the federal judiciary. The effect of California's rule is to draw the circle around the defendants classified as "incompetent" with a slightly smaller radius than is used in some other jurisdictions. A few defendants who would otherwise be considered marginally incompetent will instead be considered marginally competent. This distinction is not fundamental, and ought not be a constitutional rule.

C. Congressional Determination.

Congress is the organ of government explicitly charged with enforcement of the Fourteenth Amendment. U. S. Const. amend. XIV, § 5. A determination by Congress that a particular procedure is suitable for federal courts should therefore be particularly persuasive authority that the same procedure in a state court meets the requirements of due process.[7]

Prior to 1984, the controlling statute said nothing either way on the burden of proof. See 28 U. S. C. former § 4244, 521 (1982 ed.). In the absence of Congressional direction, federal courts placed the burden on the prosecution when the defense is asserting incompetency. *United States* v. *DiGilio*, 538 F. 2d 972, 988 (CA3 1976); *United States* v. *Makris*, 535 F. 2d 899, 906 (CA5 1976).

The 95th Congress considered a bill to reform the criminal code. Among its many other provisions, it would have revamped the statutes on competency to stand trial. The bill made this provision for the competency hearing: "*If*, after the hearing, the court finds by a preponderance of the evidence that the defendant *is* presently suffering from a mental disease or defect . . . the court shall commit the defendant to the custody of the Attorney General." S. 1437, 95th Cong., 2d Sess. § 3611(d) (1978) (emphasis added).

---

7. The converse, of course, is not true. States generally have no obligation to follow the federal lead on procedure and evidence. See *Lowenfield* v. *Phelps*, 817 F. 2d 285, 294 (CA5 1987), aff'd, 484 U. S. 231 (1988).

The bill did not pass, but the language quoted drew a chilly reception from a commentator who favors defendant's position. "Moreover the proposed statute apparently intends to *reverse the present 'burden of proof' . . . .*" Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 65 (1977) (emphasis added).

Pizzi's interpretation is correct. The language clearly implies that an affirmative finding of incompetency is required. The committee report states simply "Subsection (d) of section 3611 provides that the court must make a determination with respect to the defendant's competency based upon a preponderance of the evidence." S. Rep. No. 95-605, 95th Cong., 1st Sess. 1031 (1977).

Congress appears to have been undeterred by the criticism. When it returned to the question of mental defenses in 1984, it copied the operative language verbatim from the earlier bill. See 18 U. S. C. § 4241(d). Even the corresponding paragraph of the committee report was copied from the earlier report. See S. Rep. No. 225, 98th Cong., 1st Sess. 236, reprinted in 1984 U. S. Code Cong. & Admin. News 3182, 3418. This change is in accord with Congress's evident intent to tighten up on mental defenses. See, *e.g.*, *id.*, at 230.

To date, the change seems to have escaped judicial notice. Pre-1984 decisions are cited as authority as though nothing had changed. See, *e.g.*, *Lowenfield*, *supra* note 7, 817 F. 2d, at 294. Nonetheless, we cite the statute for what Congress has said, not what courts have done with it. The language is clear enough on its face. The body explicitly charged with enforcement of the Fourteenth Amendment believes that placing a preponderance burden on the party asserting incompetency is valid. That determination is entitled to considerable weight.

In summary, while defendant may have a respectable *policy* argument, he has not made out a case of a violation of a *fundamental* right. "The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment." *Mu'Min* v. *Virginia*, 114 L. Ed. 2d 493, 509, 111 S. Ct. 1899, 1908 (1991).

IV. Constitutionalizing rules is undesirable and should be avoided.

From the few, simple rules of procedure which are actually in the Bill of Rights, there has been promulgated "a detailed Code of Criminal Procedure to which a new chapter is added every year." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 156 (1970). Defendant asks this Court to add yet another chapter.

Constitutional rules are generally considered to be *per se* fundamental rules, even though many are really not fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). They are, therefore, given a higher degree of protection. A different and higher standard of harmless error review applies, *Chapman* v. *California*, 386 U. S. 18, 21-44 (1967), requiring retrial for errors which were highly unlikely to have affected the outcome.

When a doubtful claim of law is made on the margins of a federal constitutional right, federal courts review that claim *de novo* on habeas corpus, with only one exception so far. See *Stone* v. *Powell*, 428 U. S. 465, 477, 481-482 (1976). While the "new rule" limitation of *Teague* v. *Lane*, 489 U. S. 288 (1989) has mitigated this effect, a large amount of relitigation must still be done on the application of old rules. See, *e.g.*, *Wright* v. *West*, pending case No. 91-542. The questions of whether a rule is "new" and whether an exception applies must also be litigated. See, *e.g.*, *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990).

These additional proceedings cost time, cost money, and diminish the deterrent effect of the death penalty. While these costs must be borne to correct truly fundamental violations, they weigh against the unnecessary creation of new constitutional rights. Each new right created will inevitably create a zone of litigable uncertainty. The continuing growth of the *Miranda* rule is proof enough of that. See, *e.g.*, *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting).

The rule at issue here is one on which reasonable people can and do differ. It is not the kind of fundamental rule which justifies the extra litigation burden that comes with constitutional status.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Dated: January, 1992

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
JEANNE ANDRACHEK

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record